TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 277.

THE UNITED STATES, APPELLANT,

vs.

AMMEN FARENHOLT.

APPEAL FROM THE COURT OF CLAIMS.

FILED APRIL 28, 1906.

(20232.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 277.

THE UNITED STATES, APPELLANT,

vs.

AMMEN FARENHOLT.

APPEAL FROM THE COURT OF CLAIMS.

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32246—06

1 In the Court of Claims.

AMMEN FARENHOLT
v.
THE UNITED STATES } No. 26191.

I. *Petition.—Filed September 8, 1904.*

To the Honorable the Court of Claims:

The claimant, Ammen Farenholt, respectfully represents:

I. That he entered the service as an assistant surgeon May 29, 1894, and was promoted and reached the grade of passed assistant surgeon with the rank of lieutenant on December 26, 1900, and held said grade and rank during all the times hereinafter mentioned. From December 26, 1900, to July 27, 1901, he was on duty attached to the U. S. S. "Concord" and U. S. S. "Oregon," beyond the limits of the States comprising the Union, and was paid the unmounted pay of a lieutenant in the Navy at twenty-one hundred and sixty dollars a year.

II. During said period he claims pay at the rate of twenty-six hundred and forty dollars a year, as follows:

The mounted pay of a captain in the Army, at.....	$2,000.00
Twenty per cent increase for longevity pay after ten years' service.....	400.00
Ten per cent increase for services outside the limits of the United States.....	240.00
Total.....	$2,640.00

2 The above claim is made under the following laws: The act of March 3, 1899 (30 Stat. L., 1007), providing that officers of the Medical Corps of the Navy shall receive the same pay and allowances provided for officers in the corresponding rank in the Army; sections 1261 and 1262; R. S., fixing the pay of a captain after ten years' service at twenty-four hundred dollars a year; section 1466, R. S., providing that lieutenants in the Navy shall rank with captains in the Army; section 1168, R. S., fixing the pay of assistant surgeons in the Army with the rank of captain; the act of May 26, 1900 (31 Stat. L., 211), and the act of March 2, 1901 (31 Stat. L., 903), providing ten per cent increase of pay when beyond the limits of the States comprising the Union.

The difference, amounting to two hundred and eighty-two dollars and sixty-six cents, he claims.

No assignment or transfer of this claim, or of any part thereof or interest therein, has been made, and the claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets. The claimant is a citizen of the United States. And the claimant claims the sum of two hundred and eighty-two dollars and sixty-six cents ($282.66).

GEORGE A. & WM. B. KING,
Attorneys for Claimant.

U. S. NAVAL TRAINING STATION,
SAN FRANCISCO, CAL.

Ammen Farenholt, surgeon, U. S. Navy, being duly sworn, deposes and says: I am the claimant in this case. I have read the above petition, and the matters therein stated are true, to the best of my knowledge and belief.

A. FARENHOLT,
Surgeon, U. S. Navy.

Subscribed and sworn to before me this 31st day of August, 1904.

W. H. WHITING,
[SEAL.] *Rear-Admiral, U. S. Navy.*

3 II. *Traverse.—Filed March 22, 1906.*

In the Court of Claims of the United States, December Term, A. D. 1905–6.

AMMEN FARENHOLT
vs.
THE UNITED STATES. } No. 26191.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

J. A. VAN ORSDEL,
Assistant Attorney-General.

4 III. *Argument and submission.*

This cause was argued by Mr. William B. King for the claimant, and Mr. John Q. Thompson for the defendants, on the 22nd day of March, 1906, and submitted.

5 Court of Claims. No. 26191.

IV. *Findings of fact and conclusion of law.—Filed March 26, 1906.*

AMMEN FARENHOLT
v.
THE UNITED STATES.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT:

I.

The claimant, Ammen Farenholt, entered the naval service as an assistant surgeon May 29, 1894, and was promoted to the grade of passed assistant surgeon May 29, 1897. He attained the rank of lieutenant on December 26, 1900, and was a passed assistant surgeon in the Navy with the

rank of lieutenant during all of the time covered by this petition.

6 From December 26, 1900, to April 12, 1901, he was on sea duty attached to the U. S. S. "Concord." From April 12, 1901, to July 27, 1901, he was on sea duty attached to the U. S. S. "Oregon."

The claimant has already received pay at mounted rates for the periods before December 26, 1900, and after July 27, 1901, under the decisions of the Court of Claims in Richardson v. United States (38 C. Cls., 182), as applied by the Comptroller of the Treasury in Brownell's case (9 Comp. Dec. 676), but the Treasury Department declines to allow him mounted pay between these dates only because it considers that it is deprived of jurisdiction over the claim therefor by reason of a prior allowance and settlement of pay for the same period.

II.

PAY.

If entitled to army pay at mounted rates for this period the amount due would be as follows:

7 Pay of a lieutenant of the Navy, which corresponds in rank with a captain in the Army, mounted, from December 26, 1900, to July 27, 1901, with increased pay for length of service, 7 months and 2 days at $2,400.00 per annum $1,413.33

Less amount received for same period at $2,160.00 per annum $1,272.00

Difference $141.33

III.

PRIOR DECISION FOLLOWED.

Before the date of the decision of this court in the case of Richardson v. The United States (38 C. Cls., 182), January 5, 1903, assistant surgeons in the Navy received only the pay of an officer of corresponding rank in the Army "not mounted." By that decision it was held that they are entitled to the pay of such an officer "mounted." This decision was not appealed from and has been accepted as the proper interpretation of the law. It has been applied by ruling of the Comptroller of the Treasury to passed assistant surgeons.

8 All officers of the Medical Corps in grades for which there is in the Army pay table a distinction between "mounted" and "not mounted" pay, have ever since been paid at mounted rates of pay for their service from the date the personnel act took effect, July 1, 1899, to the present time.

CONCLUSION OF LAW.

Upon the foregoing findings of fact, the court decides as a conclusion of law, on the authority of Richardson v. United States (38 C. Cls., 182), that the claimant is entitled to recover against the United States the sum one hundred and forty-one dollars and thirty-three cents ($141.33).

By a majority of the court.

9 5. *Judgment of the court.*

AMMEN FARENHOLT
v.
UNITED STATES. } No. 26191.

At a Court of Claims held in the city of Washington on the 26th day of March, 1906, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the claimant and do order, adjudge, and decree that the claimant, Ammen Farenholt, do have and recover of and from the United States the sum of one hundred and forty-one dollars and thirty-three cents ($141.33).

BY THE COURT.

10 7. *Application for, and allowance of, appeal.*

AMMEN FARNHOLT
vs.
THE UNITED STATES. } No. 26191.

From the judgment rendered in the above-entitled cause on the 26th day of March, 1906, in favor of claimant, the defendants, by their Attorney-General, on the 17th day of April, 1906, make application for, and give notice of, an appeal to the Supreme Court of the United States.

J. A. VAN ORSDEL,
Assistant Attorney-General.

Filed April 17, 1906.

Ordered: That the application for appeal in the above-entitled cause be allowed as prayed for.

BY THE COURT.

April 17, 1906.

11 Court of Claims.

AMMEN FARENHOLT
vs.
UNITED STATES. } No. 26191.

I, John Randolph, assistant clerk of the Court of Claims, hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact and conclusion of law filed by the court; of the judgment of the court; of the application for, and allowance of, appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 27th day of April, 1906.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

12 (Indorsement on cover:) File No., 20232. Court of Claims. Term No. 277. The United States, appellant, vs. Ammen Farenholt. Filed April 28th, 1906. File No., 20232.

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FILE COPY.

Office Supreme Court, U. S.
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JAMES H. McKENNEY,
CLERK

No. 277.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES, APPELLANT,

v.

AMMEN FARENHOLT.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

J. A. VAN ORSDEL,
Assistant Attorney-General.

JOHN Q. THOMPSON,
Special Attorney.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES, APPELLANT,
v.
AMMEN FARENHOLT.
} No. 277.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is a claim by a passed assistant surgeon of the Navy with rank of lieutenant, for mounted pay from December 26, 1900, to July 27, 1901, during which time the claimant was on duty attached to the U. S. S. *Concord* and U. S. S. *Oregon*. (Rec., p. 1.)

In addition to the foregoing the petition asks for 10 per cent increase for services outside the limits of the United States, but this part of the claim has been abandoned by claimant.

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The case was tried in the court below, and the court made the findings of fact set forth in the record, pages 2 and 3, inclusive, and upon said findings based the following conclusion of law:

CONCLUSION OF LAW.

> Upon the foregoing findings of fact, the court decides as a conclusion of law, on the authority of *Richardson* v. *United States* (38 C. Cls., 182), that the claimant is entitled to recover against the United States the sum one hundred and forty-one dollars and thirty-three cents ($141.33).
>
> By a majority of the court. (Rec., p. 3.)

On March 26, 1906, judgment was rendered and ordered to be entered in favor of the claimant. (Rec., p. 4.) From said judgment the United States appeals to this court.

The amount in the judgment thus appealed from is insignificant. This is, however, what may be termed a "class case," and the decision of the court herein will affect the fifty passed assistant surgeons in the Navy in their yearly pay from June 30, 1900, when the act was past, providing for the office of passed assistant surgeons in the Navy.

THE STATUTES.

Section 13 of the so-called navy personnel act, past March 3, 1899, provides in part as follows:

> That after June thirtieth, eighteen hundred and ninety-nine, commissioned officers of the line of the Navy and of the Medical and Pay

> Corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army.
>
> (See 30 Stat. L., p. 1007.)

Section 1466, Revised Statutes, in fixing the status of officers of the Navy with reference to officers of the Army, commonly termed "assimilated rank," provides as follows:

> The relative rank between officers of the Navy, whether on the active or retired list, and officers of the Army shall be as follows, lineal rank only being considered:
>
> The vice-admiral shall rank with the lieutenant-general.
>
> Rear-admirals with major-generals.
>
> Commodores with brigadier-generals.
>
> Captains with colonels.
>
> Commanders with lieutenant-colonels.
>
> Lieutenant-commanders with majors.
>
> Lieutenants with captains.
>
> Masters (afterwards lieutenants of junior grades) with first lieutenants.
>
> Ensigns with second lieutenants.

The act of March 3, 1899 (sec. 7, 30 Stat. L., 1006), contains the following provision:

> *And provided further*, That all sections of the Revised Statutes which, in defining the rank of officers or positions in the Navy, contain the words "*the relative rank of*" are hereby amended so as to read "*the rank of*."
>
> * * * * *

Section 1261, Revised Statutes, provides in part as follows:

> The officers of the Army shall be entitled to the pay herein stated after their respective designations:
>
> The General: Thirteen thousand five hundred dollars a year.
>
> Lieutenant-general: Eleven thousand dollars a year.
>
> Major-general: Seven thousand five hundred dollars a year.
>
> Brigadier-general: Five thousand five hundred dollars a year.
>
> Colonel: Three thousand five hundred dollars a year.
>
> Lieutenant-colonel: Three thousand dollars a year.
>
> Major: Two thousand five hundred dollars a year.
>
> Captain, mounted: Two thousand dollars a year.
>
> Captain, not mounted: Eighteen hundred dollars a year.

Section 1262, Revised Statutes, provides:

> There will be allowed and paid to each commissioned officer below the rank of brigadier-general, including chaplains and others having assimilated rank or pay, ten per centum on their current yearly pay for each term of five years of service.

It will be seen from the foregoing that the claimant, during the time covered by this claim, held the rank of lieutenant in the Navy and, as provided by section 1466, he ranked with a captain in the Army.

THE ISSUE.

Section 1466 recognizes captains in the Army *mounted* and captains *not mounted.*

The claimant contends that notwithstanding he was a naval officer and on board ship, and therefore had no use for a horse, yet he should be ranked, for the purpose of pay, with a captain in the Army mounted.

The Government's contention is that inasmuch as claimant had no use for a horse in performing his duties he ranks, for the purpose of pay, with a captain in the Army *not mounted.*

ARGUMENT.

One of the main purposes of the navy personnel act is to equalize the pay of naval officers with that of officers in the Army of equal rank. This view of the navy personnel act has been recognized by the Court of Claims in many so-called navy personnel cases. It has also been recognized by claimant's counsel and by this court in the case of *United States* v. *Crosley* (196 U. S. R., 332).

Mounted pay in the Army is given to recompense the army official who is required to be mounted for purchasing, maintaining, and keeping a horse. Whatever sum the mounted officer receives over and above the regular pay of his grade in the nature of mounted pay is in turn expended by him in the maintenance of his mount, and, therefore, notwithstanding he may receive more pay than his brother officer who is not

mounted, by reason of the necessary additional expenditures occasioned by his mount, the two captains in the Army are put upon an equality so far as actual compensation is concerned.

Section 1262, Revised Statutes, provides for longevity pay, and in computing the pay of claimant it is necessary for the accounting officers to take into consideration the question of longevity pay as fixed by said section. It is, however, not necessary here to consider the question of longevity pay, as the same in no way enters into the issue in determining the right of claimant to mounted pay. Aside, then, from longevity increase, as provided by section 1262, Revised Statutes, a captain in the Army mounted receives $200 a year more than a captain not mounted, as shown by section 1261, Revised Statutes. The theory is that this $200 per year is expended, as we have indicated, in the purchase of the officer's horse and of the maintenance of the same; so, as a matter of fact, the mounted captain has received at the end of the year no more compensation than the captain not mounted. The mounted captain, therefore, has no advantage in the way of compensation over his brother officer in the Army of like rank who does not receive mounted pay..

Officers of the Medical Corps of the Navy are not required to be mounted and, therefore, have no expenditures in the way of purchasing and maintaining a horse. The claimant, during the time covered by this claim, ranked with a captain in the Army; he served on United States battle ships; his service

was of such character that he could not use a horse. To grant him mounted pay would give him an advantage over his brother army officer with whom he ranks in the way of a gratuity of $200 per year, which sum he could not expend in the purchase and maintenance of a mount for use on the war vessels during the time he was so serving. Such a discrimination in favor of the naval officer is not in harmony with the principle of equality sought to be established by the navy personnel act between officers of the Navy and officers of the Army.

THE CROSLEY CASE.

The court has clearly exprest itself to the effect that only those naval officers whose duties require them to be mounted are entitled to mounted pay. In the case of *United States* v. *Crosley* the court said:

> We think these sections, with section 1301 of the Army Regulations, above quoted, read in the light of the statute (Rev. Stat., sec. 1270) giving to army officers the pay of cavalry officers of the same grade when assigned to duty which requires them to be mounted, indicate a general purpose to give to officers of the Army mounted pay when their duties are such as may require them to be actually mounted or are such as may at any time subject them to the necessity of rendering mounted service. The particular section (1301) under which it is insisted that a naval aid is entitled to mounted pay designates officers who either are or may be required to be mounted in the discharge of their duties and likewise to "officers on duty which, in the

opinion of the department commander, requires them to be mounted and so certified by the latter on their pay vouchers."

This paragraph was intended to include the particular class of officers who are entitled to pay as mounted officers under the classification in the first part thereof and gives the benefit of the higher rate of compensation to other officers not expressly named therein whose duties require them to be mounted. It may be true, as argued at the bar, that there may be times when the duties of an aid to a major-general will not require him to be mounted, but, as we understand the Army Regulations, such officers may be at any time required to render mounted service and are therefore given the pay of that class. Obviously, the duties of an aid to a rear-admiral are not such as to require him to render mounted service, and as the navy personnel act only undertakes to afford a measure of compensation for duties which can properly be required of a naval officer, it can have no operation to provide pay for services peculiar to the Army. As was held in *Thomas* v. *United States, supra,* it does not follow because Congress gives special pay to army officers that the same right of compensation applies to naval officers also. In that case it was held that an allowance to army officers who might be ordered to sea or a foreign port could not be given to naval officers whose regular duties require them to engage in service upon the sea and to cruise upon foreign waters and serve in foreign ports.

The present case affords still less reason for giving the pay of an army officer to one in the Navy where the compensation is given for a character of service which never can be required except in the Army.

Upon this branch of the case we think the Court of Claims was in error, and the judgment for mounted pay should not have been rendered in favor of the claimant.

The judgment of the Court of Claims is modified, disallowing the sums claimed in the petition and carried into the judgment on account of mounted pay and longevity pay based thereon and, as modified, is affirmed.

(See 196 U. S. R., 335 to 337, inclusive.)

In the light of the foregoing decision the claimant in the case at bar is certainly not entitled to mounted pay, inasmuch as he was a naval officer whose duties did not and could not require him to be mounted.

THE RICHARDSON CASE.

The claimant, on the trial of this case in the court below, insisted upon, and the court made, the following finding:

III.

PRIOR DECISION FOLLOWED.

Before the date of the decision of this court in the case of *Richardson* v. *The United States* (38 C. Cls., 182), January 5, 1903, assistant surgeons in the Navy received only the pay of an officer of corresponding rank in the Army "not mounted." By that decision it was held that they are entitled to the pay of

such an officer "mounted." This decision was not appealed from and has been accepted as the proper interpretation of the law. It has been applied by ruling of the Comptroller of the Treasury to passed assistant surgeons.

All officers of the Medical Corps in grades for which there is in the Army pay table a distinction between "mounted" and "not mounted" pay, have ever since been paid at mounted rates of pay for their service from the date the personnel act took effect, July 1, 1899, to the present time.

(Record, p. 3.)

It is true that Richardson was granted mounted pay; that the decision was not appealed from and has been accepted as the proper interpretation of the law. Furthermore, it is a fact that this ruling has been extended by the Comptroller of the Treasury to passed assistant surgeons.

The Richardson case was not appealed because, in the opinion of the officers of the Department of Justice, the decision is correct. But we deny that the ruling in the Richardson case is in any way applicable to the case at bar. We contend that the Comptroller of the Treasury committed error in extending the decision in the Richardson case to cover claims for mounted pay made by passed assistant surgeons. The court below followed this error of the Comptroller, as evidenced by its findings and conclusion of law.

As may be seen by the record, page 3, Richardson was an *assistant* surgeon in the Navy. The claimant

in the case at bar is a *passed assistant* surgeon in the Navy.

Assistant surgeons in the Navy are placed upon an entirely different basis as to mounted pay than passed assistant surgeons. There is an express statute which defines the rank of *assistant* surgeons and which provides that they shall rank with assistant surgeons in the Army, but this provision *is not extended to passed assistant* surgeons in the Navy. The act of June 7, 1900 (31 Stat. L., 697), provides in part as follows:

> The active list of surgeons shall hereafter consist of fifty-five and that of passed assistant and assistant surgeons of one hundred and ten. *Assistant surgeons shall rank with assistant surgeons in the Army.*

Upon the last sentence of the foregoing statute, which provides that assistant surgeons of the Navy shall rank with assistant surgeons of the Army, rests the whole superstructure of the Richardson case, and it is not applicable to any officer of the Navy other than assistant surgeons. The foregoing statute specially provides that Richardson, being an assistant surgeon in the Navy, should rank with assistant surgeons in the Army, but its provisions do not extend, as we have seen, to *passed assistant* surgeons in the Navy. Assistant surgeons in the Army being mounted, the court very justly granted mounted pay to Richardson, who ranked with assistant surgeons in the Army; but had the Congress intended passed assistant surgeons in the Navy to

receive mounted pay it would have made provision whereby such passed assistant surgeons should rank with passed assistant surgeons in the Army. The absence of any such provision in the statute quoted is conclusive evidence that the Congress did not intend that the special privilege granted to assistant surgeons should be extended to passed assistant surgeons. For this reason the judgment in the case of Richardson was not appealed from, and for the same reason we contend that the Comptroller and the court below were in error in extending the ruling in the Richardson case to cover claims made by passed assistant surgeons for mounted pay.

SECTION 1168, REVISED STATUTES.

The claimant in his petition seems to rely upon that part of section 1168, Revised Statutes, which fixes the pay of assistant surgeons in the Army with the rank of captain. An examination of said section, together with that portion of the act of June 7, 1900, found at the foot of page 697, 31 Stat. L., will convince the court that the latter statute revised and supersedes the former with respect to assistant surgeons. Section 1168 provided for one hundred and fifty assistant surgeons, but made no provision whatever for the office of passed assistant surgeon, while the act of June 7, 1900, makes provision that the active list of passed assistant and assistant surgeons of the Navy shall consist of one hundred and ten, and then makes the further pro-

vision which we have quoted, to wit: "That assistant surgeons shall rank with assistant surgeons in the Army." The latter statute is found in an act entitled "An act making appropriations for the naval service for the fiscal year ending June thirtieth, nineteen hundred and one, and for other purposes." (31 Stat. L., 684.)

It is difficult to understand by what theory claimant's counsel rely upon section 1168, Revised Statutes. It is as much out of place in the argument of this case as it would be in the decalog. The statutes that we have heretofore given are all the statutes and the only statutes that need be or should be considered in determining the claimant's right in this action. Having been placed by the navy personnel act upon the same pay and allowances, except forage, as an officer of corresponding rank in the Army, it is necessary to ascertain from section 1466 the army officer corresponding in rank with claimant. There is no other source and no other statute to which the mind of the investigator may be directed in seeking to ascertain the army officer with whom this claimant holds rank. Having learned his corresponding rank with the army officer, as shown by section 1466, Revised Statutes, claimant is necessitated to consult sections 1261 and 1262, Revised Statutes, for information as to what amount his brother army officer corresponding with claimant in rank receives in the way of compensation, and these statutes determine the claimant's pay. There

is no provision made by law or by regulation granting to this claimant, directly or indirectly, the increase of pay which he seeks.

It may be suggested that the Congress discriminated between assistant and passed assistant surgeons in giving to the former mounted pay and withholding it from the passed assistant surgeons. Why this discrimination, it is not necessary for us to determine. It certainly is not for the court to make the correction if an injustice has been done to any one class of naval officers. That is a matter for the Congress, and if a discrimination exists Congress is the proper authority to provide the remedy. It is not the province of the courts to read into a statute that which does not exist or to provide legislation where there is an absence of legislation in order to correct an inequality or injustice.

J. A. VAN ORSDEL,
Assistant Attorney-General.

JOHN Q. THOMPSON,
Special Attorney.

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Office Supreme Court,
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JAMES H. McKENN

IN THE

Supreme Court of the United States.

October Term, 1906.

No. 277.

THE UNITED STATES, *Appellant,*

v.

AMMEN FARENHOLT.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

GEORGE A. KING,
WILLIAM B. KING,
Attorneys for Appellee.

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IN THE

Supreme Court of the United States.

October Term, 1906.

THE UNITED STATES, *Appellant*,
v.
AMMEN FARENHOLT. } No. 277.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLÆE.

I. Statement of the Case.

Introductory.

This is a claim by a passed assistant surgeon of the navy with the rank of lieutenant for pay corresponding to that of a mounted officer of corresponding rank in the army from December 26, 1900, to July 27, 1901. The claimant has been paid at mounted rates before and since the period covered by his claim under decisions of the Court of Claims and Controller of the Treasury to be presently referred to. He failed to receive it for the period covered by the claim only for the reason that the Treasury Department had made a prior settlement for the same period and for that reason considered that it was deprived of jurisdiction over the claim.

He brought suit in the Court of Claims for the difference between the pay at the rate of an army officer "not mounted" already received by him, and the rate for such officer "mounted." The court gave judgment in his favor for the amount claimed and the United States took this appeal.

The case depends upon the construction of the statutes for the pay of officers of the army as applied to the navy by Section 13 of the Navy Personnel Act. The question of contemporaneous construction is also involved. The statutes as well as the decisions of the Court of Claims and the Controller thereunder will now be stated.

Statutes.

Navy Personnel Act (March 3, 1899, Section 13, 30 Stat. L. 1007):

SEC. 13. "That, after June 30th, 1899, commissioned officers of the line of the navy and of the Medical and Pay Corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army."

Medical Corps of Army.

At the time of the passage of the Personnel Act, the following provision of law regarding the Medical Department of the army was in force as a portion of "An Act reorganizing the several staff corps of the army," approved June 23, 1874 (18 Stat. L. 244)—superseding the provision of Rev. Stat. § 1168 on the same subject.

SEC. 4. That the Medical Department of the Army shall hereafter consist of * * * * fifty surgeons, with the rank, pay, and emoluments of majors; one hundred and fifty assistant surgeons, with the rank, pay, and emoluments of lieutenants of cavalry for the first five years' service, and with the rank, pay, and emoluments of captains of cavalry after five years' service."

Assistant surgeons thus receive pay at mounted rates in the grades in which there is a distinction between "mounted" and "not mounted" pay. These grades are those of captains and lieutenants (Rev. Stat. Section 1261). Surgeons rank as majors, a grade in which no such distinction exists. The pay of a "captain, mounted," is $2,000 a year and of a "captain, not mounted," $1,800 a year (Rev.Stat. Section 1261, quoted in brief for the United States, page 4.)

Medical Corps of Navy.

The Revised Statutes provide as follows:

"SEC. 1368. The active list of the Medical Corps of the Navy shall consist of fifteen medical directors, fifteen medical inspectors, fifty surgeons, and one hundred assistant surgeons."

It will be seen that no separate office of passed assistant surgeon is here provided for. It is provided, however:

"SEC. 1371. No person shall be appointed surgeon until he has served as an assistant surgeon at least two years, on board a public vessel of the United States at sea, nor until he has been examined and approved for such appointment, by a board of naval surgeons, designated by the Secretary of the Navy."

Also by section 1474, it is provided that passed assistant surgeons shall have the relative rank of lieutenant or master and assistant surgeons the relative rank of master or ensign. (Title of "master" changed to "lieutenant, junior grade," March 3, 1883, 22 Stat. L. 472).

By section 1556, different rates of pay are provided respectively for surgeons, passed assistant surgeons and assistant surgeons of the navy. This provision is superseded by the comprehensive provision of the thirteenth section of the Personnel Act above quoted, which

provides that all officers of the Medical Corps shall be paid at the rates of pay provided for officers of corresponding rank in the army. By the seventh section of the Personnel Act, quoted in brief for the United States, p. 3, the words "the relative rank of" are changed to read "the rank of."

By the act of June 7, 1900, 31 Stat. L. 697, it is provided:

"The active list of surgeons shall hereafter consist of fifty-five, and that of passed assistant and assistant surgeons of one hundred and ten. Assistant surgeons shall rank with assistant surgeons in the army."

Court of Claims Decision in Richardson Case.

In *Richardson* v. *United States*, 38 C. Cls. 182, the Court of Claims had before it the question whether an assistant surgeon of the navy was entitled to be paid at the rate of an officer of corresponding rank in the army "mounted" or "not mounted." The court decided that he was entitled to be paid at the mounted rate. The following passage of the opinion gives the ground of the decision, 38 C. Cls. 193, 194:

"The Personnel Act of March 3, 1899, provides:

"'That after June 30, 1899, commissioned officers of the line of the navy and of the Medical and Pay Corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the army.'

"This statute, read in connection with section 1168 of the Revised Statutes, which provides 'that assistant surgeons shall rank with a lieutenant of cavalry for the first three years of service and with the rank of captain of cavalry after three years of service,' fixes the rank and pay of the claimant in this case.

"It is provided in the act of March 3, 1899, that the commissioned officers of the navy shall receive the same pay and allowances, except forage, of an officer of the cor-

responding rank in the army. The only exception in the act of 1899 against the officer in the navy is that he shall not receive forage, it being in contemplation of Congress that the navy officer was not necessarily a mounted officer, and, therefore, an exception is made against him in the allowance of forage.

"Section 1261 of the Revised Statutes provides that the officers of the army 'shall be entitled to the pay therein stated after their respective designations.' In those designations we find first and second lieutenants 'mounted' and 'not mounted,' thereby recognizing a condition applicable to officers of that class dependent upon whether they belong to the cavalry or the infantry service. A lieutenant in the cavalry is presumed to be mounted, a lieutenant in the infantry is presumed not to be mounted, and the classification of 'mounted' and unmounted pay was intended in a general way to mark a distinction between the pay of an officer engaged in the cavalry and an officer engaged in the infantry service. The 'mounted pay' was not an allowance but a part of the officer's pay proper, and the purposes of the personnel act of March 3, 1899, was to fix an equality of pay proper between the officers of the navy and the army corresponding in rank, where such pay is not qualified or changed, in the rate of pay of an officer in the army.

"The disallowance of forage was a discrimination against the officer of like grade or rank in the navy, because the necessity of forage did not exist, and, therefore, the right is not incident to the officer serving in the navy, but in all other particulars his pay was left equal to the officer of like rank in the army. The pay of the rank is taken as the basis of the pay of the claimant, and is not based upon the theory that he may be mounted, but upon the basis that mounted pay is designated as the measure of his compensation."

Decision of Controller of the Treasury.

The Court of Claims in Finding III, Record, page 3, finds as follows:

"Before the date of the decision of this court in the case of *Richardson* v. *The United States* (38 C. Cls. 182), January

5, 1903, assistant surgeons in the navy received only the pay of an officer of corresponding rank in the army 'not mounted.' By that decision it was held that they are entitled to the pay of such an officer 'mounted.' This decision was not appealed from and has been accepted as the proper interpretation of the law. It has been applied by ruling of the Comptroller of the Treasury to passed assistant surgeons.

"All officers of the Medical Corps in grades for which there is in the army pay table a distinction between 'mounted' and 'not mounted' pay, have ever since been paid at mounted rates of pay for their service from the date the personnel act took effect, July 1, 1899, to the present time."

In Finding I, page 3, the decision of the Controller referred to, is shown to be that in *Brownell's* case, 9 Cont. Dec. 676. The material portion of that decision is as follows: 9 Cont. Dec. 678, 679, 680:

"The above case has not been appealed to the Supreme Court and the claimant contends that under the above decision a passed assistant surgeon of the navy is entitled to receive mounted pay corresponding to his rank in the army. I do not think the problem here presented is solved by the Act of June 7, 1900, *supra.*

"Section 1261, Revised Statutes, provides that:

"'The officers of the army shall be entitled to the pay herein stated after their respective designations: * * * captain mounted, $2,000 a year; captain not mounted, $1,800 a year; first lieutenant mounted, $1,600 a year; first lieutenant not mounted, $1,500 a year; * * *

"The mounted pay was not an allowance, but part of the officer's pay proper. Section 1556 of the Revised Statutes provides:

"'The commissioned officers and warrant officers on the active list of the Navy of the United States * * * shall be entitled to receive annual pay at the rates herein stated after their respective designations: * * * passed assistant surgeons * * * during the first five years after date of appointment; when at sea, $2,000; on shore duty,

$1,800; on leave or awaiting orders, $1,500; after five years from such date: When at sea, $2,200; on shore duty, $2,000; on leave or awaiting orders, $1,700. Assistant surgeons * * * during the first five years after date of appointment, when at sea, $1,700; on shore duty, $1,400; on leave or awaiting orders, $1,000; after five years from such date, when at sea, $1,900; on shore duty, $1,600; on leave or waiting orders, $1,200.'

"Section 1474, Revised Statutes, provides:

"'Officers of the Medical Corps on the active list of the Navy shall have relative rank as follows: * * * passed assistant surgeons, the relative rank of lieutenant or master; assistant surgeons, the relative rank of master or ensign. * * *'

"Section 1466, Revised Statutes, provides:

"'The relative rank between officers of the navy, whether on the active or retired list, and officers of the army shall be as follows, lineal rank only being considered; * * * lieutenants with captains; masters with first lieutenants; ensigns with second lieutenants.'

"By the act of March 3, 1883 (22 Stat. 472), the title of the grade of master was changed to that of lieutenant, junior grade.

"By section 1474, Revised Statutes, we find that passed assistant surgeons are entitled to the relative rank of lieutenant or master, while assistant surgeons are entitled to the relative rank of master or ensign; and by section 1556, Revised Statutes, a higher rate of compensation was given passed assistant surgeons than assistant surgeons.

"Section 7 of the Personnel Act of March 3, 1899, provides:

"'That all sections of the Revised Statutes which, in defining the rank of officers or positions in the navy, contain the words 'the relative rank of' are hereby amended so as to read 'the rank of', but officers whose rank is so defined shall not be entitled, in virtue of their rank, to command in the line or in other staff corps.'

"The Personnel Act of March 3, 1899, *supra*, provides:

"'That after June 30, 1899, commissioned officers of the line of the navy and of the Medical and Pay Corps

shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the army.'

"By this provision Congress undertook to establish an equality of pay between officers of the army and officers of the navy corresponding in rank, and the true question here presented is, What is the rank of a passed assistant surgeon in the navy and to what officer in the army does he correspond in rank?

"His pay is attached to his rank.

"I do not think there is any ground for the distinction between assistant surgeons and passed assistant surgeons that would give mounted pay to one and deny it to the other.

"I am of opinion, and so decide, that a passed assistant surgeon in the navy, with the rank of lieutenant junior grade, corresponds in rank with an assistant surgeon in the army with the rank of a first lieutenant, and that a past assistant surgeon in the navy, with the rank of lieutenant, corresponds in rank with an assistant surgeon in the army with the rank of captain.

"The claimant being a passed assistant surgeon in the navy with the rank of lieutenant, is entitled to the pay of an officer of the corresponding rank in the army, to-wit, that of an assistant surgeon with the rank of captain, which is $2,000 per annum. He is entitled, therefore, to pay at the rate of $2,000 per annum, together with longevity pay."

This decision was rendered May 22, 1903.

According to the finding of the Court of Claims (Finding III, last paragraph, record, p. 3) all officers of the Medical Corps in grades for which there is in the army pay table a distinction between mounted and not mounted pay, that is, in the grades of lieutenant, lieutenant junior grade and ensign, corresponding to captain and first and second lieutenant in the army, have ever since been paid at mounted rates of pay for all their services from July 1, 1899, to the present time.

II. Brief of Argument.

Mounted Pay to Medical Corps.

The decision of the Court of Claims in the *Richardson* case, coupled with that of the Controller in *Brownell's* case, both of which have been fully quoted above, are so well reasoned as to leave little room for further argument.

A distinction is set up in the brief for the United States, between the *Richardson* case and the present, in that the *Richardson* case related only to assistant surgeons, while the claimant in the present case is a passed assistant surgeon.

What is a Passed Assistant Surgeon?

The Controller well states in his decision above quoted the reason for not making any such distinction. A passed assistant surgeon is only an assistant surgeon who has passed his examination. He is therefore embraced within the very terms of the provision of the act of June 7, 1900, that "assistant surgeons shall rank with assistant surgeons in the army." This point is well stated in the syllabus of a decision of the Attorney-General, 19 Opinions, 169:

"In the organization of the Medical Corps of the navy a passed assistant surgeon and an assistant surgeon are officers of one and the same *grade*, but belong to different classes in such grade.

"A passed assistant surgeon is simply an assistant surgeon who has been officially notified that he has passed successfully the examination necessary to be undergone before he can be appointed a full surgeon when a vacancy occurs."

It is true that passed assistant surgeons now receive a commission (act of February 13, 1897, 29 Stat. L. 526), but this does not change the essential character of the office, as shown by its title.

Decision of this Court.

In the case of *United States* v. *Crosley*, 196 U. S. 327, in part quoted in brief for the United States, pages 7 to 9, as authority against this case, the question of mounted pay to officers of the Medical and Pay Corps was carefully distinguished from that of mounted pay to an aid to a rear-admiral, 196 U. S. 334, 335.

"The contention of the appellee is that aids, duly appointed under this section, serving in the army, are entitled to this compensation whether required to be mounted or not. And further, that the language 'pay as mounted officers' is used in the paragraph rather with a view of fixing the amount to be paid than to characterize the service required. It is doubtless true that the terms mounted pay may be used in this sense. *Richardson* v. *United States*, 38 C. Cls. 182, is cited as an illustration of this use of the phrase. In that case it was held that an assistant surgeon in the navy was entitled to mounted pay under the Navy Personnel Act, because an assistant surgeon in the army was entitled thereto. Under section 1168 of the Revised Statutes, an assistant surgeon in the army ranked with a lieutenant of cavalry for the first three years of service and with a captain of cavalry after the expiration of that period. Under these provisions the assistant surgeon was held entitled to mounted pay.

"We are further cited to a decision of the Comptroller of the Treasury, 10 Comp. Dec. 523, holding that officers of the Pay Corps of the Navy are entitled to mounted pay, as officers of the Pay Corps of the Army are given by law cavalry or mounted pay. It may well be that in these cases mounted pay was descriptive of the compensation to be paid, and an officer may therefore be entitled to it, although he renders no mounted service.

"But the right of mounted pay to an aid to a rear-admiral, assuming that the Navy Personnel Act assimilates the compensation of an admiral's aid to that of an aid to a major-general in the army, depends upon whether an aid to a major-general under section 1301 of the

Army Regulations above quoted, although he renders no mounted service, and may not be required to be mounted, is entitled to such compensation."

After citing the Army regulation, the court proceeded to decide the case as set forth in the brief for the United States, pages 7 to 9.

The reference made to the decisions allowing mounted pay to officers of the Medical and Pay Corps, as above quoted, makes the decision of this court in the *Crosley* case an authority in favor of rather than against the contention of the claimant in the present case.

Same Kind of Pay to all Medical Officers.

Counsel for the United States concedes that the *Richardson* case is correct and that assistant surgeons in the navy are entitled to mounted pay (appellant's brief, p. 11). He makes this concession upon the ground that the act of June 7, 1900 (31 Stat. L. 697, quoted in appellant's brief, p. 11), declares that assistant surgeons shall rank with assistant surgeons in the army. Under the former statutes, assistant surgeons in the navy had the rank of ensign on appointment (Rev. Stat. § 1474), corresponding to army second lieutenant. This act gives them the same rank as army assistant surgeons on appointment, namely, that of naval lieutenants, junior grade, corresponding to army first "lieutenants of cavalry" (act of June 23, 1874, 18 Stat. L. 244, quoted, *ante*, p. 2).

The Court of Claims did not decide the *Richardson* case upon the act of June 7, 1900. It is not cited in the reasoning of the opinion. They placed their decision upon the provision in the Navy Personnel Act (§ 13, 30 Stat. L. 1007, quoted *ante*, p. 2), giving to naval officers the pay of officers of corresponding rank in the army and the provision of the act of June 23, 1874 (18 Stat. L. 244, *ante*, p. 2), giving to

assistant surgeons in the army the rank of officers of cavalry. The mounted pay follows this grant of rank, and the Court of Claims says that it is "designated as the measure of compensation." If the reasoning of the Court of Claims be correct, and the right of assistant surgeons in the navy to mounted pay be because mounted pay in the army is the measure of compensation, then no reason can be assigned why passed assistant surgeons in the navy are not equally entitled to the mounted pay received by officers of the Medical Corps of the Army of corresponding rank.

An assistant surgeon in the army may have duty requiring him to be mounted, but his rank is fixed as that of an officer of cavalry without the slightest regard to the question whether his duty requires him to keep a horse. The law gives him the cavalry rank and the consequent mounted pay whether he be assigned to mounted duty or not. The duties of assistant surgeons in hospitals, in attendance at posts or stations or otherwise, except in the field, do not require them to be mounted. The Court of Claims was therefore right in saying that the mounted pay is given as the measure of compensation. It was an expression in military terms of the purpose to pay to members of the Medical Corps a greater professional compensation than that paid to infantry officers, doubtless in part on account of the expense of a medical education and in part to meet the competition of the civil demand for the services of competent surgeons. The latter has made it difficult to secure and retain the services of qualified medical officers. (Senate Report No. 21, 59th Congress, 1st Session.

These reasons apply with equal force to assistant surgeons in the navy, and the Court of Claims enforced the principle of equal pay for corresponding service by giving the army rate of pay to assistant surgeons in the navy. The correctness of this conclusion was acquiesced

in by the Government; no appeal was taken to this court; the Controller accepted the decision of the Court of Claims, and all assistant surgeons in the navy, since July 1, 1899, about eight years, have received mounted pay.

The Controller took a further step, a mere corollary of the decision of the Court of Claims in the *Richardson* case. He recognized that it would be quite anomalous to ascribe to Congress the intention of giving mounted pay to assistant surgeons and to deny it to passed assistant surgeons. All medical officers of the army have cavalry rank and pay. The principle of equality would therefore give like pay to all medical officers of the navy.

Under this ruling all passed assistant surgeons in the navy have received mounted pay from July 1, 1899. (Finding III, Record, p. 3.)

Absurd Result of Distinction.

There is a special reason why Congress could have meant no such discrimination. The pay of officers of the Medical Corps, we have seen, is fixed by their rank and not by the office of assistant surgeon or passed assistant surgeon which they may hold. Section 1474, Rev. Stat., gives to assistant surgeons the rank of master (now lieutenant, junior grade) or ensign; to passed assistant surgeons the rank of lieutenant or master (now lieutenant, junior grade). There are thus some assistant surgeons and some passed assistant surgeons both holding the same rank or grade, that of lieutenant, junior grade. If the contention of the Government be correct, an assistant surgeon with the rank of lieutenant, junior grade, is entitled to the pay of a first lieutenant of cavalry in the army. When he becomes a passed assistant surgeon, receiving a promotion in office, without change in rank or grade by that promotion, he loses his right to mounted pay and

becomes entitled only to the pay of an officer not mounted. Thus the officer on promotion to a higher office would be reduced in pay. It is quite certain that Congress intended no such result.

If mounted pay is given in the lowest office of the Medical Corps, it was surely the intention of Congress to continue it until the office and rank is reached in which there is no distinction between mounted and unmounted pay, that is, the office of surgeon, with the rank of lieutenant-commander, corresponding to major in the army (R. S., §1474). The Controller declares this argument succinctly, saying (*ante*, p. 8):

"His pay is attached to his rank. I do not think there is any ground for the distinction between assistant surgeons and passed assistant surgeons that would give mounted pay to one and deny it to the other."

Contemporaneous Construction.

The Court of Claims has found (Finding III, Record, page 3), that under the decision of the Court of Claims in the *Richardson* case, made January 5, 1903, and that of the Controller in the *Brownell* case, decided May 22, 1903, all officers of the Medical Corps have received pay at mounted pay rates for their services from July 1, 1899, to the present time. Under these circumstances, it would now be inequitable in the extreme to declare all that has been done to be erroneous and require these officers to refund what has been received by them under such abundant sanction. Even this officer has received his mounted pay (Finding I, Rec., p. 3) for the period before and after that covered by this claim and is obliged to come into court only because of a technical rule of the Treasury Department.

In *United States* v. *Alabama Railroad Company*, 142 U. S. 615, this court said, page 621:

"We think the contemporaneous construction thus given by the executive department of the Government and continued for nine years through six different administrations of that department—a construction which, though inconsistent with the literalism of the act, certainly consorts with the equities of the case—should be considered decisive in this suit. It is a settled doctrine of this court that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the Government upon the faith of such construction may be prejudiced. It is especially objectionable that a construction of a statute favorable to the individual citizen should be changed in such manner as to become retroactive, and to require from him the repayment of moneys to which he had supposed himself entitled, and upon the expectation of which he had made his contracts with the Government. These principles were announced as early as 1827 in *Edwards' Lessee* v. *Darby*, 12 Wheat. 206, 210, and have been steadily adhered to in subsequent decisions. *United States* v. *State Bank of North Carolina*, 6 Pet. 29, 39; *United States* v. *MacDaniel*, 7 Pet. 1; *Brown* v. *United States*, 113 U. S. 568; *United States* v. *Moore*, 95 U. S. 760, 763."

Again in *United States* v. *Finnell*, 185 U. S. 236, 244:

"It thus appears that the Government has for many years construed the statute of 1887 as meaning what we have said it may fairly be interpreted to mean, and has settled and closed the accounts of clerks upon the basis of such construction. If the construction thus acted upon by accounting officers for so many years should be overthrown, we apprehend that much confusion might arise. Of course, if the departmental construction of the statute in question were obviously or clearly wrong, it would be the duty of the court to so adjudge. *United States* v. *Graham*, 110 U. S. 219; *Wisconsin C. R'd Co.* v. *United States*, 164 U. S. 190. But if there simply be doubt as to the soundness of that construction—and that is the utmost that can be asserted by the Government—the

action during many years of the department charged with the execution of the statute should be respected, and not overruled except for cogent reasons. *Edwards* v. *Darby*, 12 Wheat. 206, 210; *United States* v. *Philbrick*, 120 U. S. 52, 59; *United States* v. *Johnston*, 124 U. S. 236, 253; *United States* v. *Alabama G. S. R'd Co.* 142 U. S. 615, 621. Congress can enact such legislation as may be necessary to change the existing practice if it deems that course conducive to the public interests."

In following the decision of the Court of Claims in *Richardson* v. *United States*, 38 C. Cls. 182, the Controller did only what was his duty to do. As was said by the Court of Claims in *Meigs* v. *United States*, 20 C. Cls. 181, 185, 186:

"Moreover, the decisions of the Court of Claims in general, not appealed from, are guides to the executive officers of the Government and furnish precedents for the executive departments in all other like cases."

After citing numerous statutes supporting that view, the court concludes, page 187:

"Thus the course of legislation unmistakably indicates the intention of Congress that the decisions of the Court of Claims shall be guides and precedents for the executive departments in all like cases."

This requirement that the accounting officers shall follow the decisions of this court and of the Court of Claims where not appealed from is made mandatory by a provision contained in the Sundry Civil Appropriation act of March 4, 1907. In this act, Congress, after making an appropriation for arrears of pay and bounty of volunteers, adds:

"*Provided*, That in all cases hereafter so certified the said accounting officers shall, in stating balances, follow the decisions of the United States Supreme Court or of the Court of Claims of the United States after the time for appeal has expired, if no appeal be taken, without regard to former settlements or adjudications by their pre-

decessors." Public Act No. 253, 59th Congress, Second Session, page 70.

This proviso, while following an appropriation for a particular object, constitutes, upon principles enunciated in numerous recent decisions of this court, independent and general legislation.

Georgia Banking Co. v. *Smith*, 128 U. S. 174, 181;
Telephone Company v. *Manning*, 186 U. S. 138;
United States v. *Whitridge*, 197 U. S. 135, 143;
United States v. *Falk*, 204 U. S. 143, 148.

The duty of the accounting officers to follow the decisions of this court and the Court of Claims not appealed from, which the Court of Claims in the *Meigs* case above cited deduced from prior legislation, has now received express statutory sanction. The application to passed assistant surgeons of the decision of the Court of Claims in the *Richardson* case in favor of mounted pay to assistant surgeons was not only a reasonable, but a necessary deduction from that decision. It should not, at this late date, be overturned.

Conclusion.

Passed assistant surgeons are therefore entitled to mounted pay, ranking as they do with officers of the same grade in the Medical Corps in the army. This is true as an original proposition. Even could there be any original doubt about it, the acquiescence of the Government in the *Richardson* decision of the Court of Claims and the long continued application of that decision in practice to passed assistant surgeons should now prevent the question being reopened to the prejudice of the officers.

The judgment of the Court of Claims should be affirmed.

GEORGE A. KING,
WILLIAM. B. KING,
Attorneys for Appellee.

Supreme Court of the United States.

No. 277.—October Term, 1906.

The United States, Appellant, vs. Ammen Farenholt. } Appeal from the Court of Claims.

[May 13, 1907.]

Mr. Justice McKenna delivered the opinion of the Court.

The appellee filed a petition in the Court of Claims to recover from the United States the sum of $282.66 for the difference, he alleged, he was entitled to as a passed assistant surgeon in the Navy, with the rank of lieutenant, for mounted pay from December 26, 1900, to July 27, 1901, with ten per cent increase for service outside of the limits of the United States. He was given judgment for $141.33. The ten per cent increase was not allowed.

A statement of the case is well expressed in the findings and conclusion of the court, as follows:

"The claimant, Ammen Farenholt, entered the naval service as an assistant surgeon May 29, 1894, and was promoted to the grade of passed assistant surgeon May 29, 1897. He attained the rank of lieutenant on December 26, 1900, and was a passed assistant surgeon in the Navy with the rank of lieutenant during all of the time covered by this petition.

"From December 26, 1900, to April 12, 1901, he was on sea duty attached to the U. S. S. 'Concord.' From April 12, 1901, to July 27, 1901, he was on sea duty attached to the U. S. S. 'Oregon.'

"The claimant has already received pay at mounted rates for the periods before December 26, 1900, and after July 27, 1901, under the decisions of the Court of Claims' in *Richardson* v. *United States*, (38 C. Cls. 182,) as applied by the Comptroller of the Treasury in Brownell's case (9 Comp. Dec. 676,) but the Treasury Department declines to allow him mounted pay between these dates only because it considers that it is deprived of jurisdiction over the claim therefor by reason of a prior allowance and settlement of pay for the same period.

"If entitled to army pay at mounted rates for this period the amount due would be as follows:

Pay of a lieutenant of the Navy, which corresponds in rank with a captain in the Army, mounted, from December 26, 1900, to July 27, 1901, with increased pay for length of service, 7 months and 2 days, at $2,400.00 per annum.....	$1,413.33
Less amount received for same period, at $2,160.00 per annum...	1,272.00
Difference.....	$141.33

"Before the date of the decision of this court in the case of *Richardson* v. *The United States*, (38 C. Cls. 182,) January 5, 1903, assistant surgeons in the Navy received only the pay of an officer of corresponding rank in the Army 'not mounted.' By that decision it was held that they are entitled to the pay of such an officer 'mounted.' This decision was not appealed from and has been accepted as the proper interpretation of the law. It has been applied by ruling of the Comptroller of the Treasury to passed assistant surgeons.

"All officers of the Medical Corps in grades for which there is in the Army pay table a distinction between 'mounted' and 'not mounted' pay, have ever since been paid at mounted rates of pay for their service from the date the personnel act took effect, July 1, 1899, to the present time.

Conclusion of Law.

"Upon the foregoing findings of fact, the court decides as a conclusion of law, on the authority of *Richardson* v. *United States*, (36 C. Cls. 182,) that the claimant is entitled to recover against the United States the sum one hundred and forty-one dollars and thirty-three cents ($141.33).

"By a majority of the court."

Section 13 of the act of March 3, 1898, (30 Stat. 1007,) called the Navy Personnel Act, provides "that after June 30, 1899, commissioned officers of the line of the Navy and of the Medical and Pay Corps shall receive the same pay and allowance, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army."

Section 1466, Revised Statutes, assimilates in rank lieutenants in the Navy with captains in the Army. And section 1261 fixes the pay of a captain mounted at $2,000 a year and a captain not mounted at $1,800 a year. Section 1262 gives ten per cent increase for each term of five years' service.

The appellee is a lieutenant in the Navy; he ranks with a captain in the Army, but the question is, Of which class, mounted or not mounted?

The Government contends, with captains not mounted. Its argument is that the extra pay that mounted officers receive is not compensation, but reimbursement for expenses incurred, and to give it to a naval officer who does not bear such expenses would produce the inequality that the Navy Personnel Act was passed to prevent. *United States* v. *Crosbey*, 196 U. S. 332. Counsel, however, concedes that *Richardson* v. *United States*, 38 C. Cls. 182, was correctly decided, and that the rule has been extended by the Comptroller of the Treasury to passed assistant surgeons, but attacks the practice of the Comptroller and rejects the application of the Richardson case upon the distinction between an *assistant* surgeon, which Richardson was, and a passed assistant surgeon, which appellee is.

The act of June 7, 1900, (31 Stat. 697,) provides that "the active list of surgeons shall hereafter consist of fifty-five and that all passed assistant and assistant surgeons of one hundred and ten. *Assistant* surgeons shall

rank with assistant surgeons in the Army." Commenting on this statute the Government says: "Assistant surgeons in the Army being mounted the court very justly granted mounted pay to Richardson, who ranked with assistant surgeons in the Army." In other words, the Government contends it was the purpose of Congress to give the inferior officer the better pay. The Assistant Attorney General ventures on no explanation of this anomaly, but insists upon the written word. A court is not always confined to the written word. Construction sometimes is to be exercised as well as interpretation. And "construction is the drawing of conclusions respecting subjects that lie beyond the direct expression of the text from elements known from and given in the text—conclusions which are in the spirit, though not within the letter of the text." Lieber, 56. The application of this rule is clear. Consideration of the provisions relative to the rank and pay of officers of the Army and Navy make it evident that Congress used the words "assistant surgeon" as descriptive of the whole class of assistant surgeons, passed as well as those not passed.

Judgment affirmed.

Mr. Justice MOODY took no part in the decision of this case.

True copy.

Test:

Clerk Supreme Court, U. S.